QUESTIONS PRESENTED

1. Does a federal statute that requires that a regional airports authority must, as a condition of obtaining a lease of federal airports, give Members of Congress a veto over the operation of those airports, violate the doctrine of separation of powers, the Bicameralism and Presentment Clauses, the Appointments Clause, and the Incompatibility Clause of the Constitution?

2. Did the courts below correctly conclude that this case satisfies the ripeness and standing requirements of Article III of the Constitution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-906

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,

Petitioners,

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

BRIEF FOR RESPONDENTS

In transferring the Metropolitan Washington Airports to a regional authority, Congress gave nine of its Members a veto over the operation of the airports, notwithstanding this Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Despite the United States' attempt to limit the principles involved in this case to congressional control over airports that its Members regularly use, this scheme would provide a blueprint for Congress to create legislative vetoes over a wide range of other powers delegated under the Property and Spending Clauses of the

Constitution. In order to understand why this mechanism of legislative aggrandizement is unconstitutional, it is necessary to review the congressional origins and purposes of the Board of Review in greater detail than in the briefs of petitioners and the United States.

STATEMENT

I. THE TRANSFER OF THE METROPOLITAN WASHINGTON AIRPORTS.

In contrast to all other commercial airports in the United States, which are operated by state, local, or regional authorities, Washington National and Dulles International Airports were owned and operated by the federal government prior to 1987. Even though the two airports had been a net money-maker, with National Airport in particular earning a sizable annual profit, Congress had been unwilling to commit the substantial funds that were needed for capital improvements.[1] As a result, federal operation of the airports had led to inadequate airport facilities and related problems. Senate

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[1] *Transfer of National and Dulles Airports: Hearings on S. 1017 & S. 1110 Before Subcomm. on Aviation of the Senate Comm. on Commerce, Science, & Transportation*, S. Hrg. No. 338, 99th Cong., 1st Sess. 48 (1985) ("Senate Hearings") (statement of Elizabeth Hanford Dole, Secretary of Transportation) ($16 million positive cash flow in 1984); Senate Comm. on Commerce, Science, & Transportation, Metropolitan Washington Airports Transfer Act of 1985, S. Rep. No. 193, 99th Cong., 1st Sess. 5 (1985) ("Senate Report") (projected annual profits of $21-24 million over 1987-1990 period); Congressional Research Service, *Federal Ownership of National & Dulles Airports: Background, Pro-Con Analysis, & Outlook* 2 (1985) ("CRS Report") (Joint Appendix in Court of Appeals ("Ct. App.") 35) (1983 profit of $11.4 million).

Hearings at 45 (statement of Sec'y Dole) ("Under federal control, budgetary concerns have meant that improvements to the facilities are slow in coming"); Senate Report at 2 ("inclusion of the airports in the unified Federal budget has generally stymied most efforts to improve or expand facilities at either airport to keep pace with the growing commercial and air travel needs of the Washington area").

During the congressional proceedings leading to the transfer legislation, there was complete agreement that federal funds had historically been inadequate to deal with the airports' problems and that some congressional action was sorely needed to create an infusion of capital on the order of $250 million. *See* Senate Report at 2. The vexing issue was whether to devise a financial solution that retained federal control or to transfer control to an entity other than the federal government, which would raise money outside the federal budget. Those who supported divestiture had been thwarted previously because of Congress' "reluctance to transfer control over the use of National Airport to a local authority that could limit service at the airport." CRS Report at 1 (Ct. App. 34).

A. *The Initial Transfer Proposals.*

In order to build political support for its plan to divest the federal government of managerial responsibilities over National and Dulles Airports, the Secretary of Transportation appointed an advisory commission to develop proposals for transferring the airports to a state, local, or regional body. Joint Appendix ("J.A.") 12. A majority of the commission recommended that the two airports be leased to a regional authority established by an interstate compact between the Commonwealth of Virginia and the District of Columbia and governed by a body whose members would be appointed by

the Governors of Virginia and Maryland, the Mayor of the District of Columbia, and the President of the United States. J.A. 15-17. The commission provided no mechanism for retaining congressional or federal oversight other than the lease mechanism and the presidential appointee on the governing body. J.A. 16-17.

After the advisory commission issued its report, Virginia and the District of Columbia enacted laws authorizing the establishment of a regional authority in keeping with the commission's recommendations. 1985 Va. Acts ch. 598 (Pet. App. 87a) (adopted on April 3, 1985); D.C. Law 6-67 (1985) (Pet. App. 119a) (signed by Mayor on October 9, 1985). Like the advisory commission recommendations, neither the Virginia nor the District of Columbia laws required, or even permitted, the establishment of a board of review that would oversee the Airports Authority's actions.

In April 1985, at the behest of the Secretary of Transportation, legislation was introduced in the Senate that embodied the advisory commission's recommendations and that also contained no board of review provisions. *See* S. 1017, 99th Cong., 1st Sess., *reprinted in* Senate Hearings at 4. At hearings held in the summer of 1985, the Department of Transportation and representatives of the governments of both Virginia and the District of Columbia endorsed the bill. Senate Hearings at 40-49, 78-97, 109-11, 124-26 (statements of Sec'y Dole, Donald Engen, Administrator of Federal Aviation Administration ("FAA"), Sen. Trible, Virginia Gov. Robb, Rep. Parris, Rep. Wolf, D.C. Mayor Barry, D.C. Council Chair Clarke, and D.C. Council Member Kane).

These and other supporters of the transfer bill pointed to the capability that regional authorities have to finance airport improvements by issuing bonds, as compared with the

federal government's failure to finance such improvements out of the federal budget. *See id.* at 32 (statement of Sen. Warner), 40-42, 45, 69-70 (statement of Sec'y Dole). They also favored a mechanism that would ensure a "local voice in the matters of the running of this airport, on matters of safety, on lifestyle, noise, and things of that nature." *Id.* at 37 (statement of Sen. Warner); *id.* at 50 (noise level and traffic congestion "are issues that are very much of concern to the local community. And as economic development goes forward, they are both issues that rightfully should give them a voice") (statement of Sec'y Dole).

The primary opposition was led by Senator Hollings, who wanted to retain federal control over the two airports on the theory that they "belong[] to all the people." *Id.* at 70 (statement of Sen. Hollings); *accord id.* at 36, 38, 53 (statements of Sens. Hollings & Exon). In order to preserve federal control, Senator Hollings proposed an alternative bill that would have provided $250 million to National and Dulles Airports from the Airport and Airway Trust Fund, but the Committee on Commerce, Science, and Transportation rejected this approach. S. 1110, 99th Cong., 1st Sess. (introduced on May 8, 1985), *reprinted in* Senate Hearings at 28-29; Senate Report at 2-3. Another proponent of retaining federal control, Senator Exon, offered an amendment that would have added three members from outside the Washington metropolitan area to the Airports Authority's Board of Directors, but the Committee rejected this amendment. Senate Report at 17 ("Increased Federal membership would not be necessary to the protection of Federal interests, which are adequately guaranteed by the provisions of the bill, and would be contrary to the intent of the bill to shift control to a regional authority"); *see also id.* at 12-13 ("The Committee considered but did not adopt language to decrease Virginia representation on the Board by two members and increase

the Federal representation accordingly"). After rejecting these attempts to retain federal control over the airports, the Senate passed the airports transfer legislation, still without any board of review provisions. 132 Cong. Rec. S4116 (daily ed. April 11, 1986).[2]

In June 1986, the House Subcommittee on Aviation held hearings on the Senate bill and on a competing bill that would have transferred the airports to a federal corporation under the supervision of the Secretary of Transportation. *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337, H.R. 5040, & S. 1017 Before Subcomm. on Aviation of the House Comm. on Public Works & Transportation*, H.R. Hrg. No. 61, 99th Cong., 2d Sess. (1986) ("House Hearings"). Many House Members vigorously opposed the transfer because they wanted to retain federal control over the airports. Thus, one Representative stated: "Local residents opposed to nearby noise have, for many years, attempted to close National Airport and divert the traffic to Dulles.. . . If we transfer this airport to local control, what assurance do we have that local residents will now, all of a sudden, start

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[2]Maryland officials also opposed the bill because Maryland would have fewer representatives on the Airports Authority than Virginia and the District of Columbia, and joint operation of National and Dulles Airports would, in their view, give those airports an unfair competitive advantage over Baltimore-Washington International Airport ("BWI"), which is owned and operated by the State of Maryland. Senate Hearings at 97-99 (statement of Sen. Sarbanes); *id*. at 99-106 (statement of Gov. Hughes); *id*. at 111-12 (statement of Rep. Byron). As a result of a Senate amendment that provided a payment to Maryland in order to offset any competitive disadvantage that the transfer might cause to BWI, Maryland withdrew its objections. Senate Report at 17; 132 Cong. Rec. S14,862 (daily ed. Oct. 3, 1986) (statement of Sen. Sarbanes).

supporting these improvements at National?" House Hearings at 22 (statement of Rep. Sundquist). *Accord id*. at 1-3 (statements of Chairman Mineta and Rep. Hammerschmidt supporting transfer of the airports to a federal corporation). In response to these concerns, the Secretary of Transportation asserted that the transfer would serve the Members' needs for efficient and quick air service, but that further guarantees could be provided through congressional oversight of the federal lease or through the addition of "statutory language that will assure Congressional interests are addressed, even including the details of individual parking places." House Hearings at 110-11 (statement of Sec'y Dole). Without requiring further statutory provisions protecting the federal interests, the subcommittee approved the transfer legislation. *See* 132 Cong. Rec. H11,098 (daily ed. Oct. 15, 1986).

B. *Congress' Development of the Board of Review Provisions to Retain Congressional Control Over the Airports.*

Before the full committee considered the legislation, the subcommittee drafted several substitute bills with a single goal in mind: to establish a congressional board of review with the power to veto major actions of the Airports Authority, such as the adoption of an annual budget, the issuance of bonds, the promulgation of regulations, and the adoption of development and land acquisition plans. Ct. App. 86-88, 115-18, 133-36; J.A. 28. While the drafts differed in the way that the Board of Review members would be selected, they all required that the Board be composed of Members of Congress, with two drafts adding the Comptroller General, who is a congressional official, and another adding the chief executive officers of Virginia, Maryland, and the District of Columbia. *Id*.

In order to bolster congressional support for the administration's transfer legislation, Assistant Attorney General John R. Bolton rendered an advisory opinion on the constitutionality of these proposals. *See* J.A. 25. In that opinion, Mr. Bolton found serious constitutional defects in the first plan, which would have created a "federal board of directors" composed of three members of the House, appointed by the Speaker, three members of the Senate, appointed by the President *pro tempore*, and the Comptroller General. J.A. 26-28; *see* Ct. App. 86-88; *see also id.* 115-18. In his view, a veto by such a board "would plainly be legislative action that must conform to the requirements of Article I, section 7 of the Constitution: passage by both Houses and approval by the President." J.A. 26, *citing INS v. Chadha*, 462 U.S. 919, 954-55 (1983). Moreover, he concluded, "since the responsibilities to be exercised by the Board are clearly operational, . . . its members would have to be appointed by the President or the head of an executive department or agency, and members of Congress could serve, if at all, only in an advisory capacity." J.A. 27 (footnotes omitted).

Mr. Bolton found similar constitutional defects in the second plan, which would have required Virginia and the District of Columbia to establish a board of directors having the same composition as the federal board in the first option. Although he concluded that Members of Congress may constitutionally exercise state executive power, the fact that the states would formally establish the board "would not change the fact that *Congress* is unwilling to give its consent to the transfer unless it is able to retain some direct control, through its agents, over the use of the property." J.A. 33 (emphasis in original). Because, "in form and substance it would be a creation of Congress, intended to exercise legislative authority on behalf of Congress," Mr. Bolton predicted that "the courts would view this Board as an attempt by

Congress to circumvent the clear requirements of Article I, section 7 . . . ." J.A. at 32; *see id.* 32 n.16 ("we cannot ignore that the alternative requiring the states to establish the Board has been proposed precisely to avoid the clear constitutional objections raised by any direct effort by Congress to establish and empower the Board -- a context that strongly suggests Congress intends the Board, however authorized, to act as its agent").

The third subcommittee plan changed the composition of the board so that four members would be selected by the Board of Directors of the Authority from the membership of each House, a ninth member would be selected alternately from the House and the Senate, and all of the board members would be designated as representatives of airport users. Ct. App. 133-36. The Justice Department concluded that, "[a]lthough the issue is not free from doubt," J.A. 35, the third plan would not run afoul of *Chadha* because "[t]he members of the Board would serve in their individual capacit[ies] as users of the airport and not as representatives of Congress, and would be appointed by the Board of Directors of the Airports Authority from names submitted by the Speaker of the House and the President *pro tempore*." J.A. 34. According to the Justice Department, "[i]f it were made clear that those members serve only in an individual capacity, to represent their personal interests in the operation of the airports, rather than as agents of Congress, we do not believe a *Chadha* problem would *necessarily* be presented." J.A. 33 (emphasis added). Toward that end, the Department recommended that either the bill or its legislative history state that "the congressional members of the Board shall represent only their personal interests," J.A. 34, and "that Congress does not intend the Board to function as an adjunct or agent of Congress *qua* Congress . . . ." J.A. 35; *accord* J.A. 34 n.19 ("the congressional members would have to take care to distin-

guish between their respective roles as members of Congress and as member[s] of the board").

C. *Legislative Endorsement of the Board of Review Provisions as a Means of Retaining Congressional Control Over the Airports.*

Armed with the Department of Justice's qualified stamp of approval, the Senate added this last version of the congressional Board of Review to the transfer legislation, and then passed the amended bill as an amendment to the continuing resolution for fiscal year 1987. 132 Cong. Rec. S14,862-65 (daily ed. Oct. 3, 1986). As a precaution against Congress losing control over the airports as a result of an adverse ruling on the constitutionality of the Board of Review, the Senate inserted a "drop-dead" clause, which provides that the Airports Authority would itself lose the power to perform any of the actions that are subject to the Board of Review's veto if a court declared that veto power unconstitutional. *See* 132 Cong. Rec. H11,093 (daily ed. Oct. 15, 1986). This provision is in sharp contrast to the general severability clause in the Transfer Act, which preserves valid portions of the law if other portions are declared invalid. 49 U.S.C. App. § 2460. Despite the absence of any hearings on the Board of Review, the Senate passed this amended version without any debate or discussion. 132 Cong. Rec. S14,862-65 (daily ed. Oct. 3, 1986).

In the House floor debate, which constitutes the only recorded congressional discussion of the Board of Review provisions, numerous Members acted contrary to the Justice Department's advice and stressed the importance of the Board of Review as a mechanism for retaining congressional, not user, control over the airports. As one Member put it, the bill "provides for continued congressional control over both

airports [since] Congress would retain oversight through a Board of Review made up of nine Members of Congress [who] would have the right to overturn major decisions of the airport authority...." 132 Cong. Rec. H11,098 (daily ed. Oct. 15, 1986) (statement of Rep. Coughlin).

Another Member reiterated that the "board has been established to make sure that the Nation's interest, the congressional interest[,] was attended to in the consideration of how these two airports are operated." 132 Cong. Rec. H11,103 (daily ed. Oct. 15, 1986) (statement of Rep. Hoyer). Many Members believed the transfer would "not give up congressional control and oversight -- that remains in a Congressional Board of Review," *id.* at H11,105 (statement of Rep. Conte), but one Congressman went even further and stated "[w]e will have more control [through the veto power] than before.... At present, pressure on FAA seems to be our only way to influence events at the two airports." *Id.* at H11,106 (statement of Rep. Hammerschmidt). Perhaps the most frank assessment came from Representative Smith, who stated:

> Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority ....We are getting our cake and eating it too....The beauty of the deal is that Congress retains its control without spending a dime.

Id. at H11,100; *accord id.* at H11,098 (statement of Rep. Lehman) (the "Congressional Board" would provide "for continuing congressional review over the major decisions of the new airport authority"); *id.* at H11,104 (statement of Rep. Smith) ("[f]or those who are concerned that local authorities won't be able to efficiently run the airports, the Congress

would retain some oversight responsibility through a board of review"); *id.* (statement of Rep. Dickinson) ("the areas of interest that we are concerned with . . . whether it be the parking for the Members . . . whether it be congressional control, these have been addressed in the proposed legislation").

The House, however, was not content with the Board of Review prescribed by the Senate bill. Thus, it approved an amendment that requires that the Board of Review consist of two members of each of the four committees with principal jurisdiction over the Washington area-airports -- the House Public Works and Transportation Committee, the House Appropriations Committee, the Senate Commerce, Science, and Transportation Committee, and the Senate Appropriations Committee -- as well as one Member of Congress chosen alternately from the House and the Senate. *Id.* at H11,097-98. The specific committee membership requirements, like the "drop-dead" provision added in the Senate, fundamentally altered the board of review provisions so that they no longer "closely resemble[d]" the version approved by the Department of Justice. U.S. Br. at 5; *see id.* at 35 n.20.

Although one Member questioned whether this revised scheme would pass constitutional muster, *id.* at H11,098, H11,099, & H11,105 (statements of Rep. Snyder), the House approved the airports transfer legislation without any discussion of why Members of Congress were needed to represent the interests of airports users generally, as opposed to the particular interests of Congress. *Id.* at H11,106. Eventually, the Senate concurred in the House amendment, and the President signed the transfer bill into law as part of a continuing resolution. 22 Weekly Comp. Pres. Docs. 1496 (Nov. 3, 1986); Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, §§ 6002-6012, 100 Stat. 3341 (1986) ("Transfer Act").

D. *The Transfer Act Mandates a Congressional Board of Review with Ultimate Control Over the Airports.*

As enacted into law, the Transfer Act requires that the Board of Directors of the Airports Authority establish, as a condition of the transfer of the airports, a nine-member Board of Review that "shall consist of" Members of Congress with the requisite committee affiliations set forth in the House amendment. 49 U.S.C. App. § 2456(f)(1). While the Transfer Act states that these Members of Congress will serve "in their individual capacities, as representatives of the users of the Metropolitan Washington Airports," *id.*, they must all be Members of Congress, and they cannot be from Maryland, Virginia, or the District of Columbia. *Id.* Moreover, the Airports Authority is not free to select anyone even from the eligible Members of Congress, but is limited to the names submitted by the Speaker of the House and the President *pro tempore* of the Senate, who are not required to submit, and, in practice, have sometimes not submitted, more names than the number of vacant slots. *Id.*; J.A. 44-45, 57.[3]

Under the Act, the Board of Review must have the power to veto the Airports Authority's core actions. 49 U.S.C. App. § 2456(f)(1) & (4). Thus, the Airports Authority cannot authorize the issuance of bonds, appoint a chief

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[3]While the Transfer Act is silent with respect to the power to remove Board of Review members, the Airports Authority has claimed the power to remove members for cause. J.A. 47, 60. However, any replacement appointments must be nominated by the congressional leadership and must serve on the same congressional committees as the removed members.

executive officer, adopt an annual budget, approve development or land acquisition plans, or change its regulations, without first submitting its proposed action to the Board of Review for consideration and an opportunity to veto the action. *Id.* § 2456(f)(4).

In addition to its ability to disapprove all major actions of the Airports Authority, the Board of Review may "request" that the Airports Authority consider, vote, or report on any matter related to the two airports, and the Airports Authority has a statutory obligation to comply with any such "request" as promptly as feasible. *Id.* § 2456(f)(5). Members of the Board of Review may also participate as nonvoting members at all meetings of the Airports Authority's Board of Directors. *Id.* § 2456(f)(6). Moreover, as a result of the Transfer Act, but not the Virginia or District of Columbia statutes, it is the Board of Directors, not the Board of Review, that is liable even for actions taken at the urging of the Board of Review or as a result of a veto. *Id.* § 2456(f)(8).

Although the Transfer Act contains a general severability clause, *id.* § 2460, the Senate-added "drop-dead" clause deprives the Airports Authority of its core powers if the Board of Review is declared unconstitutional. *Id.* § 2456(h). This provision underscores Congress' intent to retain control over the airports either through the Board of Review or by rendering the Airports Authority essentially powerless to perform its tasks without further congressional action.

E. *Virginia, the District of Columbia, and the Airports Authority Acceded to the Board of Review as a Federally Imposed Condition on the Transfer of the Airports.*

On March 2, 1987, four months after passage of the

Transfer Act, the Secretary of Transportation and the Airports Authority entered into a lease, which requires the Airports Authority to establish, and to be bound by the veto decisions of, a Board of Review that meets the Transfer Act's specifications. Pet. App. 175a-78a. The lease spells out the precise composition and powers of the Board of Review set forth in the Transfer Act, as well as the statutory bar on the Airports Authority taking any of the actions subject to the Board of Review's veto power, if the Board of Review is judicially barred from exercising that power. *Id.* On March 4, 1987, the Airports Authority adopted bylaws, including the Board of Review provisions contained in both the Transfer Act and the lease. Pet. App. 151a-54a.

It was not until after the Transfer Act had been enacted and the lease had been signed that Virginia and the District of Columbia amended their previously enacted airports authority laws to add any reference to a board of review. In compliance with the conditions of the federal Transfer Act and the federal lease, these amendments give the Airports Authority the power "to establish a board of review," although they do not require it to do so. More importantly, these laws do not describe the composition or powers of the Board of Review, let alone mandate that it be composed entirely of Members of Congress. Unlike the "drop-dead" clause in the Transfer Act and lease, these laws do not deprive the Airports Authority of the power to undertake the matters that must be submitted to the Board of Review in the event of a judicial order invalidating that Board's veto authority. *See* 1987 Va. Acts ch. 665, § 5.A.5 (Pet. App. 111a); D.C. Law 7-18, § 3(c)(2) (1987) (Pet. App. 143a).

This lack of detail concerning the Board of Review's composition and powers is in sharp contrast to the Virginia and District of Columbia provisions establishing the Airports

Authority's Board of Directors, which contain all of the requirements of the federal Transfer Act, as well as numerous powers and obligations based on state law. 1985 Va. Acts ch. 598, §§ 4-23 (Pet. App. 89a-105a); 1987 Va. Acts ch. 665, §§ 4-6 (Pet. App. 109a-14a); D.C. Law 6-67, §§ 5-24 (Pet. App. 123a-38a). This contrast is even more startling since the Board of Review has the power to override the Board of Director's decisions in direct contravention of the laws of Virginia and the District of Columbia, which make the Board of Directors responsible for the corporation's affairs. *See* D.C. Code §§ 29-332, 29-337; Va. Code Ann. § 13.1-673.

As this discussion demonstrates, the Transfer Act is the ultimate "but for" cause of the Board of Review. Had Congress not mandated the creation of such a Board of Review, the federal lease would not have required the Airports Authority to make itself subservient to Congress' operational control. Nor would Virginia or the District of Columbia have independently mandated such a body. Indeed, even in the face of the federal command in the Transfer Act and the federal lease, Virginia and the District of Columbia did no more than authorize the Airports Authority to follow its orders, without independently mandating the composition or powers of the Board of Review, or the ultimate demise of the Airports Authority in the event that the Board of Review ceases to be able to carry out its powers.

II. PROCEEDINGS BELOW.

Respondent Citizens for the Abatement of Aircraft Noise, Inc. ("CAAN") is a nonprofit membership organization of individuals and citizens groups who wish to minimize the noise, safety, and environmental effects of air traffic at National Airport. J.A. 85-86. Most of its members, as well as John Hechinger and Craig Baab, the individual respondents,

live under National Airport's flight path, and their lives are regularly disrupted by aircraft noise, vibrations, traffic congestion, and pollution from operations at National Airport. J.A. 86; Ct. App. 164-65, 167-68.

In March of 1988, over CAAN's opposition, Ct. App. 177-80, the Airports Authority approved a master plan for National Airport, which provides for expanding the airport's capacity to handle additional air carrier operations and increased numbers of passengers and automobiles. J.A. 70-71, 90-91; Ct. App. 170-71, 314, 317-22, 328, 389-90. Although the Board of Review had previously exercised its veto to prevent the use of the Dulles Access Road for car pool commuter traffic, J.A. 83-84, the Board voted not to veto the master plan. J.A. 78. The Airports Authority has since begun implementing the master plan by issuing bonds and beginning construction at the airport. J.A. 87.

On cross-motions for summary judgment, the district court rejected petitioners' justiciability claims. Pet. App. 55a. It found that respondents have standing because the increased noise, air pollution, and safety problems that they fear "could *not* occur without the significant improvements contemplated by the [master] Plan," Pet. App. 41a, which the Airports Authority would be unable to implement without the core powers that it would lose under section 2456(h) if respondents prevail. The court rejected petitioners' ripeness claim because the case presents a purely legal issue that is not affected by the particular manner in which a veto is exercised. Pet. App. 38a. On the merits, the district court upheld the constitutionality of the Board of Review, reasoning that because Virginia and the District of Columbia freely agreed to the lease, and the Members of Congress serve on the Board of Review in their individual capacities, federal separation of

powers principles do not apply to the Airports Authority or its Board of Review. Pet. App. 46a-47a, 51a.[4]

On appeal, the United States, which intervened pursuant to 28 U.S.C. § 2403(a), agreed that the case is justiciable, but supported petitioners on the merits. The Airports Authority urged the court to decide the merits, and merely reiterated its justiciability arguments in a cursory fashion in a footnote. Ct. App. Br. at 12 n.8, 15-16 n.9. In order to satisfy itself that it had jurisdiction over this case, the court of appeals briefly reviewed and summarily rejected the justiciability contentions that had been made in the district court. Pet. App. 9a. On the merits, the majority struck down the Board of Review because it found "that the Board is effectively an agent of Congress and that its functions are executive in nature." Pet. App. 2a. Although the dissenting judge

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[4]Meanwhile, in another case, a union challenged, on both statutory and separation of powers grounds, the Labor Code adopted by the Airports Authority, which had survived review by the Board of Review. Without deciding whether the union's constitutional challenge was ripe, the district court adopted the ruling on the merits in this case and found for the union on one statutory claim and against the union on its remaining statutory and First Amendment claims. *Federal Firefighters Association, Local 1 v. United States*, 723 F. Supp. 825, 826, 828 (D.D.C. 1989). The union has appealed the separation of powers and adverse statutory rulings. *Metropolitan Washington Airports Authority Professional Fire Fighters Ass'n, Local 3217 v. United States*, No. 89-5411 (D.C. Cir.). The relief sought in that case, invalidation of the Labor Code, differs from what respondents seek here, a judicial order preventing the Board of Review and Airports Authority from taking any actions that are subject to the veto authority. Even under the court of appeals' direction "that actions taken by the Board to this date not be invalidated automatically on the basis of our decision," Pet. App. 19a, the Fire Fighters could still seek invalidation of the Labor Code in the particular circumstances of that case.

agreed that the case is justiciable, he concluded that the Board comports with the Constitution because, in his view, Congress does not control the Members of Congress who serve on the Board. Pet. App. 22a-26a.[5]

SUMMARY OF ARGUMENT

The Board of Review constitutes an attempt by Congress to recapture the legislative veto and to assign executive functions to itself. In essence, Congress is using a condition on a grant of federal property to aggrandize itself in a manner that it no longer can in relation to Executive Branch agencies. If upheld, the Board of Review provisions would provide a roadmap that would enable Congress to evade constitutional limitations on the way in which it may exercise its authority whenever federal property or money is the subject of legislation.

While a state could decide on its own to appoint Members of Congress to a state office, Congress cannot compel a state to do so as a condition of receiving federal property. When Congress requires that its Members be given executive powers, as it did here, the conclusion is inescapable that Congress is accreting powers to itself. Fearing this sort of congressional aggrandizement, the Framers limited Congress to lawmaking through bicameral passage of laws, subject to a presidential veto, and forbade Members of Congress from exercising executive powers.

The United States agrees that Congress may not, as a

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[5]Both the district court and the court of appeals rejected the exhaustion of administrative remedies defense that the Airports Authority has now abandoned. Pet. App. 9a, 38a-39a.

general matter, exceed these constitutional limitations by imposing a Board of Review condition on the transfer of federal property or funds. However, it seeks to save this particular Board of Review based on what it characterizes as the unique circumstances of this case. Not only do all of the United States' reasons for rejecting congressional review boards apply fully here, but its proposed distinctions have no basis in the Constitution and offer no limiting principle to preclude Congress from similarly aggrandizing itself in the future whenever it disposes of federal funds or property.

ARGUMENT

I. THIS CASE IS JUSTICIABLE.

Before turning to the merits, respondents will address the justiciability arguments made by the Airports Authority. Like the United States, Br. at 14-20, respondents agree that this case is justiciable.

A. *Respondents Have Standing to Bring this Challenge.*

The Airports Authority has never disputed that respondents are injured by noise, air pollution, and safety problems associated with flights to and from National Airport, and both courts below plainly found such an injury. Pet. App. 9a, 40a-41a. The Airports Authority's claim is that the master plan will not lead to increased noise, congestion, and pollution from operations at National Airport.

However, the district court made a finding, based on the Airport Authority's own master plan documents, that "an increase in both passengers and flights could *not* occur without the significant improvements contemplated by the Plan." Pet. App. 41a (emphasis in original). Even the Airports

Authority concedes that its master plan provides for several larger gates that can accommodate wide-bodied jets, some of which comply with night-time noise restrictions, but which currently cannot use National Airport's facilities at all, let alone at night. Pet. Br. at 38 n.21; *see* J.A. 91; Ct. App. 390. The master plan will also add a taxiway turnoff that will reduce time on the runway and thereby improve airport capacity. Pet. App. 41a; Pl. Ex. 16 at 10. Similarly, the plan makes numerous changes that will enable the airport to accommodate more passengers and more air operations. Ct. App. 172, 174-75. Based on the introduction of wide-bodied jets and the use of currently unused slots for aircraft operations, the master plan projects that it will enable National Airport to handle more night-time flights and additional daytime air carrier operations, which will significantly increase the number of passengers and the amount of automobile traffic at the airport. J.A. 86, 91; Ct. App. 170-71, 314, 317-22, 328, 389-90.[6]

The Airports Authority seeks to ascribe the increased air and passenger traffic to other intervening causes over which it has no control. However, it does not, nor can it, dispute that the master plan is a necessary prerequisite for the projected increase in operations at National Airport. Thus, as the United States concludes, "respondents have asserted a sufficiently concrete and personalized injury, traceable to the actions of petitioners" to maintain this action. U.S. Br. at 16.

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[6]While the Transfer Act fixes the number of takeoffs and landings per hour at National Airport, it eliminated the previously existing statutory cap on the number of passengers using that airport annually, 49 U.S.C. App. § 2458(e), and there are currently unused slots for air carrier operations at non-peak hours. Ct. App. 170, 314.

Respondents' injuries are also redressable by this action. As a practical matter, the Airports Authority can implement its master plan only if it can raise and budget the necessary funds. However, if respondents are successful in this lawsuit, the Board of Review will be unable to exercise its veto power, and, because of 49 U.S.C. App. § 2456(h), the Airports Authority will lose its authority to issue bonds, to adopt an annual budget, and to adopt or revise a master plan, all of which are necessary for expansion of National Airport. Thus, invalidating the Board of Review will make it impossible for the Airports Authority to carry out the master plan. As the district court observed, and the court of appeals agreed, the relief sought would redress respondents' injuries because "if the Authority may not issue bonds or adopt a budget, continued construction at National would cease, the additional capacity otherwise possible would be halted, and plaintiffs' asserted injuries would be averted." Pet. App. 41a-42a; *id.* 9a.

Respondents have standing to challenge the Board of Review's authority for another reason. The doctrine of separation of powers is ultimately designed to protect the people from arbitrary exercises of power. Thus, in *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), this Court concluded that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." *Accord Chadha*, 462 U.S. at 935-36. Based on *Buckley* and the core purposes of the separation of powers doctrine, respondents have standing to challenge a regulatory action to their detriment that is adopted by a process that violates the Constitution. In this case, respondents' injuries from that unconstitutional process are compounded because the Board of Review excludes local representation and thus diminishes respondents' influence over

airports matters. Pet. App. 42a. For all these reasons, respondents have standing to challenge the Board of Review.

B. *This Case is Ripe for Review.*

This case, in the words of the district court, "is as ripe as it ever will be." Pet. App. 38a. Since it raises purely legal questions based on well-developed precedent, "the particular manner in which the veto power is exercised will [not] affect the constitutionality *vel non* of the body that exercises it." *Id.* (footnote omitted). Indeed, in the wake of *Chadha*, this Court has not waited for a legislative veto to be exercised before reviewing its legality. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 682-83 & n.3 (1987). Not only would the exercise of a veto to respondents' detriment add little to the finality or definition of the legal issues under review, but a party aggrieved by an exercised veto may well be unable to obtain judicial review because a successful challenge would not redress the challengers' injuries in light of section 2456(h), which deprives the Airports Authority of the underlying power to undertake any action that is subject to a veto, if the veto is declared invalid.

Furthermore, as the district court observed, Pet. App. 38a, "[t]his is also not a situation where the possibility of a veto is abstract or ephemeral, for the Board of Review has already acted to disapprove one resolution passed by the Board of Directors" -- a regulation that would have permitted car pools to use the Dulles Access Road during morning rush hour. J.A. 83-84; *id.* 81-82. The Airports Authority's presumed desire to avoid repetitions of the access road veto, coupled with the Board of Review's actual evaluation and vote on the master plan, J.A. 73-78, create the type of "here-and-now subservience" of the Airports Authority to the Board of Review that this Court concluded made a challenge

to the Comptroller General's authority ripe in *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986). In other words, the mere existence of the veto power has inevitably shaped the Airports Authority's actions and tainted the process by which the master plan was adopted and other decisions have been and will be made.

Finally, withholding judicial review will cause hardship to respondents because they are presently threatened with increased air operations and passenger traffic from the master plan. For all these reasons, this case is ripe for judicial review at this time. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

II. THE BOARD OF REVIEW IS UNCONSTITUTIONAL.

The Constitution divided "the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. at 951. It is "a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power." *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928). Under this doctrine of separation of powers, "it is a breach of the National fundamental law . . . if by law [Congress] attempts to invest itself or its members with either executive power or judicial power." *Buckley v. Valeo*, 424 U.S. at 121-22. The Framers viewed the principle of separation of powers to be "essential to the preservation of liberty."

The Federalist No. 51 (J. Madison), at 336 (ed. Earle 1937). As this Court has repeatedly recognized, this doctrine serves "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 122.

Applying this principle in *Springer*, this Court struck down an arrangement under which members of a territorial legislature served on committees that had the authority to vote the government-owned stock of a government corporation and to appoint the executive officials who ran the corporation. This Court held that "the legislature cannot engraft executive duties upon a legislative office" or a collection of its members. *Id.* at 202. This arrangement violated the doctrine of separation of powers since nothing in that doctrine "suggest[s] that the legislature in acting in respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions." *Id.* at 203; *see also Buckley*, 424 U.S. at 138-41 (Appointments Clause bars congressional officers from appointing individuals charged with such functions as rulemaking and enforcing the law). Similarly, in *Bowsher v. Synar*, 478 U.S. 714 (1986), this Court held that the doctrine of separation of powers prohibits a congressional official from carrying out executive functions. As the Court stated, "once Congress makes its choice in enacting legislation, its participation ends." 478 U.S. at 733.

The corollary principle, followed by this Court in *Chadha*, is that Congress must comply with the Bicameralism and Presentment Clauses whenever it takes actions that are legislative in character and effect, *i.e.*, "that ha[ve] the purpose and effect of altering legal rights, duties, and relations of persons . . . outside the Legislative Branch." 462 U.S. at 952. In *Chadha*, this Court struck down a one-House legislative

veto because, once Congress delegates a legislative power to the Executive Branch, it "must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 955.

Like the doctrine of separation of powers, the bicameralism and presentment requirements are designed to guard against arbitrary action and congressional aggrandizement. As the Court observed in *Chadha*:

> The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.. . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

Chadha, 462 U.S. at 951.

In order "to protect the whole people from improvident laws," *id.*, the doctrine of separation of powers and the Bicameralism and Presentment Clauses establish affirmative limitations on the way that Congress can act, and thus, they do more than simply protect the prerogatives of coordinate branches of the federal government. Moreover, whenever Congress gives itself the power to affect legal rights through extra-constitutional means, it is aggrandizing itself at least theoretically at the expense of the Executive Branch, since the President would normally exercise such retained federal

powers or he would have a qualified veto over Congress' exercise of its lawmaking powers. *See* Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U.L. Rev. 62, 67, 70 (1990).

In the federal system, Members of Congress cannot possess authority, other than through the constitutional lawmaking process, over the adoption of budgets, the issuance of bonds, the promulgation of regulations, the adoption of development plans, or the selection of a chief executive officer. Yet, these are the precise powers exercised by the Board of Review here. As the court of appeals concluded, and no one has disputed, "[t]his authority over key operational decisions is quintessentially executive." Pet. App. 16a. Accordingly, Members of Congress are authorized to act in these areas only by passing laws in accordance with the constitutional lawmaking process; otherwise, they are barred from exercising such authority under federal law by the doctrine of separation of powers.

It clearly would have been unconstitutional for Congress to give itself or a group of its members such a veto power over airports decisions while the FAA operated the airports. The question in this case is whether the result is different when Congress has required the Airports Authority to establish a congressional Board of Review and to be bound by its veto decisions as a condition of leasing the federal airports.

Federal separation of powers principles constrain the Board of Review for three reasons. First, as demonstrated in Part A below, in mandating the establishment of the Board of Review, Congress retained significant federal authority over the airports, which it delegated to the Board of Review in violation of the Constitution. Second, as shown in Part B

below, regardless of whether the Board of Review is exercising federal or state power, Congress has sufficient control over the Board of Review to make it a congressional agent by virtue of the Board's congressional composition, appointment from lists submitted by the congressional leadership, and committee membership requirements. Third, as discussed in Part C below, even if the Board of Review derives its existence from state law, Congress may not attach a condition to the transfer of federal funds or property that enables Members of Congress to act in contravention of the doctrine of separation of powers and the Bicameralism and Presentment Clauses of the Constitution. Finally, as set forth in Part D, the United States' attempt to save this particular Board of Review condition fails because its proposed distinctions are devoid of any constitutional underpinnings or practical limitations.

A. *The Board of Review's Powers are Federally Retained Powers that Cannot Constitutionally be Exercised by Members of Congress.*

Respondents have never contended that the Constitution prohibits states from appointing Members of Congress to state offices. However, this is not a situation in which Congress transferred the Washington airports to the Airports Authority, without requiring it to establish the Board of Review, and Virginia and the District of Columbia decided, on their own, to subject the Airports Authority's decisions to a veto by individual Members of Congress. In that situation, Congress' federally prescribed role would have ceased once it passed the transfer legislation, and its authority would have been limited to passing new legislation to the extent not foreclosed by the lease with the Airports Authority.

In this case, however, Virginia and the District of Columbia did not decide on their own to establish a congressional review board. Instead, the Board of Review originated in, and is mandated by, federal law. Indeed, the concept of a Board of Review originated long after Virginia and the District of Columbia passed their statutes establishing the Airports Authority in accordance with the Holton Commission's recommendations. Like those recommendations, the original bills passed by Virginia and the District of Columbia and introduced in the Senate and House contained no Board of Review provisions. *See supra* at 4, 6.

Moreover, Congress initially approached the issue as one presenting a stark choice between federal and local control. Thus, the Senate Committee considered, but rejected, the idea of retaining federal control in the FAA, but providing it the funds needed for airport improvements. Senate Report at 2-3. Likewise, the House debated an alternative bill that would have established a federal corporation over which Members of Congress would have had no operational control. *See* House Hearings at 1-3.

It was only after both Houses rejected the clearcut alternative of retaining full federal control that the House turned to the concept of the Board of Review to enable Congress to retain operating control over the airports. Underscoring its true purpose, the House considered two versions of the Board of Review that would have vested the appointment of its Members directly in the congressional leadership. Neither the United States nor the Airports Authority has disputed that a Board of Review appointed directly by Congress would be anything other than a congressional agent that could not exercise the Board of Review's powers. Congress' attempt to camouflage the Board of Review's congressional parentage by replacing the direct congressional appointment power with the submission of short lists of Members, from

which the Airports Authority must appoint the members of the Board of Review, does not change that result. In both cases, the Board of Review provisions of the Transfer Act (not the laws of Virginia or the District of Columbia) are a blatant attempt to retain congressional control over the operation of the two airports.

The Transfer Act does not merely "describe" or "contemplate" the Board's creation and composition, as the dissent in the court of appeals suggested, Pet. App. 21a-22a; rather, it prescribes the precise composition and powers of the Board of Review. The Act mandates that "[t]he board of directors *shall* be subject to review of its actions . . . by a Board of Review [that] *shall* be established by the board of directors and *shall* consist of" nine Members of Congress, eight of whom must serve on the committees with oversight over the airports, and all of whom must be nominated by the congressional leadership. 49 U.S.C. App. § 2456(f)(1) (emphasis added). It also requires that the Board of Review be given the power to veto the core decisions, such as adopting budgets, approving master plans, issuing bonds, adopting regulations, and appointing a chief executive officer, that the Airports Authority must make to carry out its mandate. 49 U.S.C. App. § 2456(f)(4). Most importantly, Congress added the "drop-dead" clause that voids the Airports Authority's major powers if the Board of Review is precluded from exercising its veto. These express terms of the Transfer Act, which are noticeably absent from the Virginia and District of Columbia laws, demonstrate that Congress mandated the creation, and established the powers, of the Board of Review and that it did so to retain congressional control over the airports.

If there were any doubt that the Board of Review is a device for retaining congressional control over the airports, the floor debate on that provision points unequivocally to

Congress' true intent -- to ensure "continuing congressional review over the major decisions of the new airport authority." 132 Cong. Rec. at H11,098 (statement of Rep. Lehman). It can be stated no more succinctly than the words of Representative Smith: "Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority . . .. We are getting our cake and eating it too.. . . The beauty of the deal is that Congress retains its control without spending a dime." *Id.* at H1,100.

The other link in the chain is the federal lease, which imposed the Board of Review provisions of the Transfer Act on the Airports Authority. It too states, in mandatory terms, that "the Board of Directors *shall* establish a nine-member Board of Review" and "*shall* appoint" the specified congressional members to it, and "*shall* submit" the actions specified in the Transfer Act to that Board for veto. Lease §§ 13.A & 13.D (Pet. App. 175a, 177a) (emphasis added). In other words, it is the Transfer Act and the federal lease that are the ultimate "but-for" causes of the establishment of the Board of Review. Indeed, if Virginia and the District of Columbia amended their statutes to forbid the Airports Authority from having a Board of Review, the Airports Authority would likely lose its leasehold interest in the airports. *See Bell v. New Jersey*, 461 U.S. 773, 791 (1983).

In order to obtain the lucrative airports and to facilitate the improvements that all agreed were sorely needed, Virginia and the District of Columbia dutifully amended their laws to comply with the federal lease.[7] However, the amended

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[7]The brief of the Commonwealth of Virginia highlights the financial benefits of the airports to the Commonwealth. *See* VA Br. at 5 (airports "provide more than $3.2 billion in business activity, pay over $468 million in annual wages and salaries, and

laws do no more than authorize the creation of a board of review, without requiring the Airports Authority to do so, and without specifying its congressional membership or prescribing its veto authority. In addition, neither contains the provision in both the Transfer Act and the lease that essentially guts the Airports Authority's powers if the Board of Review is judicially invalidated. This lack of specificity is in sharp contrast to the Virginia and District of Columbia provisions concerning the Board of Directors, which lay out the powers of that entity in considerable detail.

Based on the way that the Board of Review came into being, the court of appeals correctly concluded that "it is wholly unrealistic to view the Board of Review as solely a creature of state law immune to separation-of-powers scrutiny." Pet. App. 12a. To the contrary, "the 'practical consequences' of the current arrangement are to maintain in place by federal law a body composed exclusively of members of Congress that exercises operational control over the airports." *Id.* Since the power of the Board of Review over the Airports Authority is a retained federal power, it must be exercised in accordance with the Constitution. The doctrine of separation of powers and the Bicameralism and Presentment Clauses bar Congress and its Members from exercising

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(continued)
generate many millions of dollars in tax revenues to the state and Northern Virginia localities"). Not only have the airports been a net moneymaker, *see supra* at 2 & n.1, but the Transfer Act requires payments of only $3 million per year in addition to a one-time payment of $23.6 million for the unfunded pension liabilities of the airports' employees, while the Grace Commission had set a purchase price of $342 million for the airports. 49 U.S.C. App. § 2454(b); General Accounting Office, *Federal Assets: Information on Completed & Proposed Sales* 10 (1988); Senate Hearings at 56 (statement of Sec'y Dole).

that power without going through the constitutional lawmaking process, which the Board of Review admittedly does not follow.

As the Airports Authority concedes, if the Board of Review wields federal power, then it is "exercising significant authority pursuant to the laws of the United States." Pet. Br. at 21 n.13, *quoting Buckley*, 424 U.S. at 126; *see also* Pet. App. 10a, 15a-16a. As such, the members of the Board of Review must also be appointed in accordance with the Appointments Clause, which authorizes the President, the courts, and department heads, but not Congress or regional bodies, to make such appointments. U.S. Const. Art. II, § 2, cl. 2. In addition, under the Incompatibility Clause, Art. I, § 6, cl. 2, Members of Congress may not hold any office charged with performing executive functions. The additional affirmative limitations imposed by the Appointments Clause and the Incompatibility Clause reinforce the constraints imposed on Congress by the Bicameralism and Presentment Clauses and give further definition to the doctrine of separation of powers.

In sum, Congress retained significant federal authority over National and Dulles Airports in the Transfer Act's Board of Review provisions. Since such retained federal powers can be exercised only in accordance with the Constitution, Members of Congress cannot constitutionally serve on the Board of Review.

B. *The Board of Review is a Congressional Agent as a Result of the Control that Congress Continues to Exercise Over its Composition and Appointment.*

Regardless of whether the source of the Board of Review's power is federal or state law, it is a congressional agent by virtue of the control that Congress exercises over its

composition and appointment. First and foremost, the Transfer Act and the federal lease require that the Board of Review consist of nine Members of Congress, eight of whom must serve on the congressional committees that have oversight responsibilities over the Washington airports. The Act and the lease seek to divorce the Members from their congressional role by reciting that the Members serve on the Board of Review "in their individual capacities as representatives of users of the Metropolitan Washington Airports." 49 U.S.C. App. § 2456(f)(1). However, as this Court recently stated in *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (*quoting Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 857 (1986)), "our separation-of-powers analysis does not turn on the labelling of an activity . . ., [r]ather, our inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences . . .'"

Under this analysis, the user label does not change the statutory requirement that the Board of Review must consist of Members of Congress, particularly since the user label is not backed up by any statutory mandate that the Members of Congress who serve on the Board of Review must, in fact, be users of the Washington airports. Moreover, the committee membership requirement underscores the congressional rather than personal interests of the Members. As the United States correctly recognizes, "the criterion of committee membership is related to congressional duties, rather than to individual use of the airports," and as such, it "undermine[s] the contention that they are appointed as individuals." U.S. Br. at 35 n.20.

The practical consequences that flow from this arrangement are also clear: Congress continues to have virtually complete control over the selection of the particular Members of Congress who will serve on the Board of Review

through two means. First, not only has Congress, through the Transfer Act, disqualified any local Members from service on the Board of Review, but it also determines which of its Members will serve on the relevant transportation and appropriation committees from which eight of the nine Board of Review members must be drawn. Since the Board of Review must "consist of" eight members of those committees, Congress can make a Member of Congress ineligible to continue serving on the Board by changing that Member's committee assignments. In this way, even if the Board of Directors has the power to remove members of the Board of Review, as it claims, the committee membership requirements give Congress a *de facto* removal power over Board of Review members, as the court of appeals concluded. Pet. App. 18a.[8]

Second, the congressional leadership decides which Members of Congress will be included on the lists submitted to the Airports Authority for appointment to the Board of Review. There is no statutory requirement that Congress submit more names than the available slots, and in practice, the lists have left the Airports Authority little choice. Thus, the Speaker *pro tempore* of the Senate submitted only four names for the initial four Senate positions, and the Speaker of the House submitted only six names for the four House slots, and only one name for the alternating slot. J.A. 44-45.

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[8]To the extent that the lease conflicts with the statute by requiring only that the Board of Directors "appoint" the specified Members of Congress to the Board of Review, rather than requiring that the Board of Review "shall consist of" such Members, *compare* Lease, § 13A (App. 175a) *with* 49 U.S.C. App. § 2456(f)(1), the statute would control since it allows a lease only with an Airports Authority created in accordance with the requirements of the Transfer Act. *See* 49 U.S.C. App. §§ 2453(2), 2454(a).

Interestingly, the Speaker confined the House list largely to Members who had voiced significant opposition to local control of the airports. J.A. 44-45; *see* House Hearings at 1-3 (statements of Chairman Mineta and Rep. Hammerschmidt); 132 Cong. Rec. H11,098, H11,105, H11,106 (statements of Reps. Lehman, Coughlin, Conte, Hammerschmidt). Moreover, the Speaker included the names of the Chairpersons of the pertinent oversight subcommittees, whom the Airports Authority apparently decided that it could not refuse. J.A. 44-45; 1987 Congressional Staff Directory at 419 (Rep. Lehman, Chair of Appropriations Subcommittee on Transportation), 456 (Rep. Mineta, Chair of Public Works and Transportation Subcommittee on Aviation). In other words, Congress can essentially preselect the Board of Review by dictating which Members of Congress are eligible to serve and which are presented to the Airports Authority for formal appointment.

The Airports Authority suggests that in *Mistretta* and *Bowsher* this Court upheld list limitations comparable to that at issue here, Pet. Br. at 24, but, in those cases, the parties never challenged the list limitations, and this Court never addressed their validity. Moreover, those list limitations are inapposite because the President was required only to consider the lists submitted to him, while the Airports Authority's Board of Directors must make its appointments *from* the lists provided by the congressional leadership. Thus, the Sentencing Reform Act directs the President to appoint three federal judges "after considering a list of six judges recommended to the President by the Judicial Conference of the United States." 28 U.S.C. § 991(a). Similarly, 31 U.S.C. § 703(a) states only that a commission composed of congressional officials shall "recommend" at least three individuals for selection as Comptroller General, and expressly provides that the President may ask the commission to recommend additional individuals. Thus, the President is not obligated to make his appointments to the Sentencing Commission and to the position of Comptroller General from the lists provided to him, but the Airports Authority has no discretion to depart from the lists submitted by the congressional leadership.

In contending that the Board of Review owes its allegiance to the Board of Directors because that Board appoints and has the power to remove the Board of Review's members, the Airports Authority and United States overlook the virtual dominance that Congress has over appointment and removal of the Board of Review members, which makes the Board of Directors' appointment powers no more than perfunctory or ceremonial. More importantly, the appointment and removal powers are primarily indicia of control that do not overcome the fact that it is the Board of Review that has ultimate power over the Board of Directors and not the other way around. The role of the Board of Directors in choosing from among eligible and listed Members of Congress does not change its "here-and-now subservience" to the Board of Review. *Bowsher*, 478 U.S. at 727 n.5. It is precisely that subservience that makes the Board of Review an agent of Congress, cannot constitutionally carry out the powers assigned to it under the Transfer Act. *Cf. Mistretta*, 488 U.S. at 393 (Sentencing Commission upheld in part because it "is not controlled by or accountable to members of the Judicial Branch.")

C. *Congress May Not Condition a Grant of Federal Funds or Property on an Agreement to Give Agents of Congress Extra-Constitutional Powers.*

To avoid these constitutional limitations, petitioners contend that Congress can give itself a veto power simply by making it a condition of a transfer of federal property. While a state's lawful enactment of a federally prescribed law may

ordinarily eliminate objections to the federal requirement, that is not the case with a congressional mandate that uses the state law as a tool to aggrandize Congress. Such a condition violates the federal doctrine of separation of powers even if the congressional agent technically draws its power from the state ratification of the congressional mandate, rather than from that mandate itself.

Petitioners rely on *South Dakota v. Dole*, 483 U.S. 203 (1987), which held, that even if Congress could not establish a national minimum drinking age, it could require the states to raise their drinking ages as a condition of receiving federal funds. However, as the court of appeals correctly concluded, Congress' Spending and Property Clause powers do not permit it "to circumvent the functional constraints placed on it by the Constitution." Pet. App. 14a.

In *Dole*, Congress had no power under Article I, section 8, to legislate a drinking age directly, but it could seek to promote its objectives by offering economic incentives under the Spending Clause to the states, which plainly have such legislative power. Here, there is no lack of federal power over National and Dulles Airports, but the Constitution limits the *method* by which Congress can control the airports to the full legislative process under the Bicameralism and Presentment Clauses. The court of appeals correctly held that Congress cannot evade these limitations by asking other entities to agree to be bound by Congress' extra-constitutional lawmaking as a condition of obtaining federal property or funds. The states cannot be counted on to oppose such efforts because they have no institutional concern for safeguarding the federal doctrine of separation of powers and will be heavily influenced to go along with a congressional role in order to obtain significant federal property or funds. *See* U.S. Br. at 32 n.19 and *supra* note 7.

In contrast to its position in the court of appeals, Br. at 10, 31-33, the United States now agrees that *Dole* does not save the Board of Review. It properly recognizes that petitioners' extension of *Dole* "would allow Members of Congress to evade the 'carefully crafted restraints' of the Constitution -- to act in an extra-legislative capacity after enacting a statute, and thereby to threaten the Executive Branch's exclusive responsibility for federal executive functions." U.S. Br. at 26, *citing Chadha*. Indeed, if Congress can evade constitutional constraints on its exercise of executive powers, "a massive loophole in the separation of powers requirement would be opened." U.S. Br. at 31.

The United States correctly perceives that the position urged by petitioners would have ramifications far beyond this case. If upheld, Congress could give itself a veto over the operation of virtually all federal properties, ranging from the national parks to veterans hospitals, simply by transferring those properties to local governments or private entities with a supervisory board of review composed of Members of Congress. There would also be no bar to transferring numerous federal programs, such as those run by the National Endowment for the Arts or the Legal Services Corporation, to the states or private entities, and using the Spending Clause to compel those entities to subject their decisions to the dictates of a congressional review board, committee, or a single House of Congress. In essence, the Board of Review provisions here provide a blueprint for evading the structural limits imposed on Congress by the Constitution whenever federal property or money is involved.

D. *No Unique Circumstances Save this Board of Review.*

Recognizing the "substantial threat of congressional aggrandizement and incursion on the Executive Branch" that

such arrangements pose, the United States contends that in most instances such conditions would violate separation of powers principles. U.S. Br. at 12, 26, 38. According to the United States, such a condition is constitutional here only because there is a "reasonable basis" for appointing Members of Congress to the Board of Review in their individual capacities, operating airports is not generally a federal responsibility, and the Executive Branch has not objected to this arrangement. U.S. Br. at 33-38. This strained attempt to save the Board of Review fails because it has no constitutional underpinnings or practical limitations.

Neither the doctrine of separation of powers nor the Constitution's bicameralism and presentment requirements dissipate when there is a "reasonable basis" for Congress (not Virginia or the District of Columbia) to deviate from these requirements. This Court has previously rejected similar attempts to evade the structural limits of the Constitution based on policy arguments or any claimed authority under the Necessary and Proper Clause. *See Chadha*, 462 U.S. at 945; *Buckley*, 424 U.S. 138-39.

Not only does this "reasonable basis" test lack any constitutional foundation, but it also could be manipulated to apply to virtually any action taken under the Spending or Property Clauses. Thus, the United States finds a "reasonable basis" for Members of Congress to oversee the airports because Members use the airports regularly to commute between their districts and Washington D.C., and because they have an interest in ensuring that their constituents can travel easily to the Nation's capitol. *Id.* at 33-34. Recognizing that a similar "reasonable basis" could be articulated for giving Members of Congress a veto over any institutions or services that Members use as individuals, such as social security, health care, education, and roads, the United States

postulates that Members of Congress have a "special and distinctive relationship" with the Washington airports that differs from the interests of the general public. U.S. Br. at 33.

Members of Congress also have a special interest in state laws concerning political parties, primaries, and the hours and conduct of elections. Members of Congress also have a distinctive interest in postal operations, particularly those pertaining to their franking privileges. They could make a case that they have a special interest in state public utility commissions because telephone rates affect their ability to serve their constituents. Moreover, since Members of Congress reside in Washington D.C. when Congress is in session, they could claim a distinctive interest in the Metrorail system, the National Zoo, Rock Creek Park, and virtually every other governmental activity in the District. Their interest in these matters is magnified because their constituents, both those who arrive by air and those who arrive by other means, use city services and visit national sites when they tour the Nation's capitol.

Even where all Members of Congress cannot claim a special or distinctive interest in federal property or a federally funded program, groups of Members may have such an interest. Thus, those Members of Congress who have served in the armed forces have a special interest in veterans hospitals. Members from jurisdictions close to Washington, D.C. may travel by train to their districts, and thus they (or their constituents) may have a distinctive interest in AMTRAK. An Arizona Senator may have a special interest in Grand Canyon National Park because he regularly visits the park or because it plays such an important role in the state's economy. Indeed, particular Senators or Representatives may have such strong personal interests in the arts that they could make a case for a veto power over grants award by the

National Endowment for the Arts. In short, there is no limiting principle to the "reasonable basis" test proposed by the United States.

The appointment of Members of Congress as representatives of airport users lacks a "reasonable basis" for three additional reasons. First, the 513 Members of Congress eligible to serve on the Board of Review, Pet. Br. at 22 n.14, are hardly representative of, for example, the more than 15 million passengers who use National Airport each year. Ct. App. 171. They are unlikely to use public transportation to travel to the airports, they generally do not travel with their families or with small children, and they have special privileges, such as designated parking spaces, not shared by the general public.[9]

Second, the Transfer Act and its legislative history destroy the fiction that Congress decided that Members of Congress should serve on the Board of Review because of their ability to represent airport users. Thus, the history is replete with references to the Board of Review as a mechanism for giving Congress control over the airports, and the draft Board of Review provisions reveal such a purpose. *See supra* at 7-12. If Congress were truly searching for a mechanism of ensuring that the operation of the airports would be responsive to user needs, a more logical approach would have been the expansion of the Board of Directors to include nationwide users, as a Senate amendment would have done. Senate Report at 13, 17. Carving out a special role for Members of Congress can hardly be characterized as an

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[9]The statement about congressional use of the airports quoted by the United States in its brief at page 33 was made by the Secretary of Transportation in support of the transfer bill when it had no Board of Review provisions. House Hearings at 110.

attempt to "guard[] against excessive parochialism" in the operation of the airports. U.S. Br. at 34.

Third, the requirement that eight of the nine Board of Review members must serve on the congressional committees with oversight responsibilities over the airports belies their individual user interest. The knowledge and expertise that Members of Congress acquire in aviation issues as a result of their service on the oversight committees is from their congressional activities not their use of the airports. *See* Pet. Br. at 22-23; Va. Br. at 9. For these reasons, the Board of Review cannot properly be characterized as a group of individual representatives of airport users, rather than an arm of Congress.

There is no basis for permitting Congress to suspend constitutional restrictions on its powers simply because it decides that there is a reasonable basis to do so. Moreover, even if this were the constitutional rule, there is no such reasonable basis here, because Members of Congress do not, in fact, represent the bulk of airport users, and the real reason they were designated (by Congress) to serve on the Board of Review was to retain congressional control, not to represent users other than themselves.

In attempt to assure the Court that any ruling in this case will have no precedential effect, the United States also contends that the anomaly of federal operation of commercial airports makes congressional aggrandizement under the same model inapplicable in other contexts. U.S. Br. at 35-36. However, it could also be said that it is anomalous for the federal government to operate hospitals, historic sites, railroads, postal operations, flood control operations, and power plants. The same could also be said about federal programs, such as those concerning legal services, health care, educa-

tion loans, food stamps, and mortgage insurance, at least prior to the time that the federal government became heavily involved in such matters. Once again, this factor offers no limiting principle.

Finally, the Executive Branch suggests that its assent to the Board of Review provisions supports their constitutionality. U.S. Br. at 36-38. Clearly, the Executive Branch cannot modify the Constitution by agreeing to a violation of its provisions. If that were the case, this Court would not have needed to reach the merits of the challenges in *Mistretta v. United States*, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), since the Executive Branch supported the statutes at issue in those cases. Indeed, in *Chadha*, this Court stated that "[t]he assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." 462 U.S. at 942 n.13. The doctrine of separation of powers is designed principally to protect the people from governmental overreaching, and not to protect the prerogatives of the Executive Branch. For this reason, the assent of the Executive Branch and obviously that of Congress -- the beneficiary of the aggrandizement of power by the Board of Review -- cannot override the requirements of the Constitution.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment below.

Respectfully submitted,

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